Supreme Court, U.S.
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No. 92-815

In the Supreme Court of the United States

OCTOBER TERM, 1992

LUIS E. FIGUEROA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an appellate court should exercise de novo review in determining whether there was probable cause for a warrant-authorized search.

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OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-7a, is reported at 35 M.J. 54. The opinion of the Navy-Marine Corps Court of Military Review, Pet. App. 8a-14a, is unpublished.

JURISDICTION

The judgment of the Court of Military Appeals was entered on August 12, 1992. The petition for a writ of certiorari was filed on November 10, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a general court-martial at Quantico, Virginia, petitioner, a member of the United States Marine Corps, was convicted on one count of conspiring to distribute cocaine, on three counts of distributing cocaine, on one count of wrongfully possessing cocaine with the intent to distribute it, and on two counts of wrongfully purchasing and engaging in the business of dealing in firearms, in violation of Articles 81, 112a, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 881, 912a, and 934. He was sentenced to confinement for ten years, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority approved the findings and sentence. The Navy-Marine Corps Court of Military Review affirmed. The Court of Military Appeals granted discretionary review of petitioner's case and affirmed.

1. At trial, petitioner moved to suppress a quantity of crack cocaine seized during a search of his on-base home by Naval Investigative Service (NIS) agents. Pet. App. 2a-3a. The commanding general of the base authorized the search after determining there was probable cause to believe that petitioner had stored in his home several handguns that had been purchased in violation of federal law and that petitioner had failed to register the weapons as required by base regulations. *Ibid.*[1] The trial judge denied petitioner's motion.

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[1] Military law authorizes a military commander with "control over the place where the property or person to be searched is situated or found" to authorize a search of such a place. Mil. R. Evid. 315(d). Before authorizing such a search, the commander must have information to support "a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched." Mil. R. Evid. 315(f)(2). In petitioner's case,

2. On appeal, the court of military review, Pet. App. 9a-11a, and the Court of Military Appeals, *id.* at 2a-7a, upheld that decision. The Court of Military Appeals explained that the relevant inquiry is whether "the commander had a substantial basis for concluding that probable cause existed to search [petitioner's] quarters," a standard of review that did not contemplate de novo review of the commander's judgment. *Id.* at 4a.

ARGUMENT

Petitioner claims that the court below applied the wrong standard of review with respect to the probable cause issue. He contends that the Court of Military Appeals should have reviewed the commander's probable cause determination de novo and that there is a split among the circuits on that issue. That claim does not warrant review by this Court.

The standard of review applied by the Court of Military Appeals is fully consistent with this Court's decisions. This Court has repeatedly counseled reviewing courts against engaging in an after-the-fact, de novo scrutiny of probable cause determinations in cases involving a warrant-authorized search. In order to encourage resort to the warrant process, the Court has emphasized that "the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed." *Illinois* v. *Gates*, 462 U.S. 213, 238 (1983) (quoting *Jones* v. *United States*, 362 U.S. 257, 271 (1960)); accord 462 U.S. at 250 (White, J., concurring in the judgment); *New York* v. *P.J. Video, Inc.*, 475 U.S. 868, 876 (1986); *Massachusetts* v. *Upton*, 466 U.S. 727, 728, 732-733 (1984); see *United States* v. *Leon*, 468 U.S. 897, 915 (1984).

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that information included the sworn statement of petitioner's coconspirator along with an affidavit from the investigating agent. Pet. App. 2a.

In this case, the search of petitioner's home was conducted pursuant to a search authorization issued by the base commander. See Mil. R. Evid. 315(d). Under military law, a base commander serves the same role that would be filled by a magistrate in the civilian community, because a base commander must be able to ensure the safety and security of all personnel on a military base. In reviewing the base commander's action, the Court of Military Appeals applied the standard of review described in *Gates* and therefore applied the standard mandated by this Court.

The cases that petitioner cites are inapposite. Most of the cases cited by petitioner deal with the very different question whether the defendant was "seized," within the meaning of the Fourth Amendment, during an encounter with the police.[2] That issue is not presented in this case.[3]

The two Seventh Circuit decisions that petitioner cites address the question whether the "substantial basis" test described in *Illinois* v. *Gates* is the appropriate

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[2] Some circuits have held that the question whether a person has been seized is a mixed question of fact and law that is subject to de novo review on appeal. See *United States* v. *McKines*, 933 F.2d 1412 (8th Cir.) (en banc), cert. denied, 112 S. Ct. 593 (1991); *United States* v. *Montilla*, 928 F.2d 583, 588 (2d Cir. 1991); *United States* v. *Maragh*, 894 F.2d 415, 417-418 (D.C. Cir.), cert. denied, 111 S. Ct. 214 (1990). Other circuits have held that this issue is a question of fact subject only to the clearly erroneous standard of review. See *United States* v. *Valdiosera-Godinez*, 932 F.2d 1093, 1098 n.1 (5th Cir. 1991); *United States* v. *Rose*, 889 F.2d 1490, 1495 (6th Cir. 1989); *United States* v. *Gray*, 883 F.2d 320, 322 (4th Cir. 1989); *United States* v. *Teslim*, 869 F.2d 316, 321 (7th Cir. 1989).

[3] *United States* v. *Mines*, 883 F.2d 801 (9th Cir.), cert. denied, 493 U.S. 997 (1989), on which petitioner relies, deals with another quite different question—the standard of reviw for determinations of the scope of a defendant's consent to search. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973).

standard of review to determine whether there was probable cause or whether a "clearly erroneous" standard should be applied. In *United States* v. *McKinney*, 919 F.2d 405 (7th Cir. 1990), the court applied the "substantial basis" test in the case of a warrant-authorized search—the same standard that was applied by the Court of Military Appeals in this case. In *United States* v. *Spears*, 965 F.2d 262 (7th Cir.), cert. denied, 113 S. Ct. 502 (1992), a different panel of the Seventh Circuit rejected the "substantial basis" test in favor of the "clearly erroneous" standard. The difference between the "clearly erroneous" and "substantial basis" formulations may be the same as the difference between dusk and twilight (Judge Posner made essentially that point in *McKinney*, 919 F.2d at 421 (concurring opinion)). In any event, neither formulation aids petitioner, since both cases clearly rejected the de novo standard of review that he endorses. *E.g.*, *Spears*, 965 F.2d at 270-272, 277. Accordingly, the decision below does not conflict with the Seventh Circuit cases that petitioner cites. His claim warrants no further review.[4]

[4] If petitioner's claim is that each appellate court must assess de novo whether a substantial basis existed for finding probable cause, *McKinney*, 919 F.2d at 408 n.2, then his petition should be denied, since the Court of Military Appeals' decision is fully consistent with that standard of review. See Pet. App. 3a-5a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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